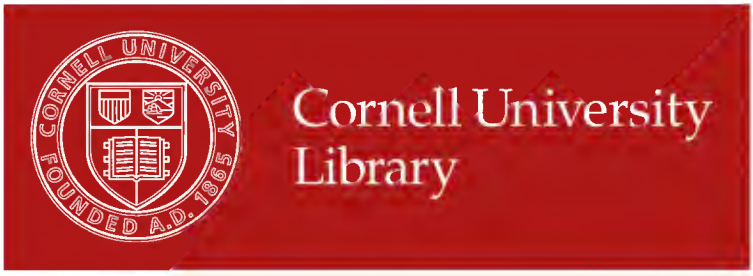

NOTE.

In this reprint the errata and addenda have all been noted in the text. It is otherwise a facsimile of the original edition.

A

SELECTION

OF

ORIENTAL CASES

DECIDED IN

THE SUPREME COURTS OF THE STRAITS' SETTLEMENTS.

COLLECTED AND ARRANGED

BY

ROBERT CARR WOODS, JUNR., ESQ.

BARRISTER-AT-LAW,

AN ADVOCATE AND ATTORNEY OF THE SUPREME COURT.

"It is more a question of comity than law, and it is difficult to say where to draw the line."

PINANG.

PRINTED FOR PRIVATE CIRCULATION,

1, NORTHAM ROAD.

1869.

PINANG.

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PREFACE.

This reprint of Judgments is made with a view of collecting for the first time into one small volume the principal Straits' ANGLO-ORIENTAL LAW CASES, that are to be found widely scattered throughout the Local Journals, and to which access cannot be had but with great difficulty. It is hoped that this Collection may be found useful to the Profession as a Repertorium pointing out the most important exceptions that have been engrafted on the Law in favor of our Chinese, Mahometan, Hindoo and other native population. A few unreported Decisions and Notes of recent Local Cases have been added as it is considered they may prove interesting or be of some service to the Bar.

The Judgment in Regina v. Willans is not included in this Collection as it is already in the hands of the Profession, and is to be found in the 3rd. volume of the Journal of the Indian Archipelago, new series.

It is hoped that this little Manual may be but the harbinger of an "authorized" edition of the Oriental Cases, revised and authenticated by the Judges, as such a work of authority would be invaluable to every one concerned in the administration of justice in the Colony, and might be a guide to future Judges in expanding the Common Law to suit the religions and customs of the natives.

The omission in our Charters of Justice of any special provisions for the native laws being administered (as in India) to the Oriental races resident in the colony has naturally created a conflict of Laws, which is in no way alleviated by H. M's. Letters Patent good-naturedly directing the administration of the Laws of England "as far as circumstances, and the religions, manners and customs of the inhabitants will admit." The Courts at present are inclined to allow the native customs to prevail when injustice would follow from strict adherence to our English

Law, but the matter may still be considered as a VEXATA QUÆSTIO, which may hereafter be finally determined in favor of our native subjects more by the force of local precedents than otherwise.

It is to be regretted that the Government or the Local Legislature have not as yet endeavoured to make regulations for the security and purity of native Marriage and Divorce Registries in this Colony, as the lax practice prevailing here and the Custom of the Kazees of taking their Registry out of the Colony whenever they travel abroad does incalculable injury.

I beg the indulgence of the Profession for the typographical errors which have crept into the following pages as the revisal was carried on with difficulty during the hours of professional duty and whilst engaged in Court.

PINANG,
1st March, 1869.

R. C. W.

JUDGES.

Recorders of Prince of Wales' Island.

Sir Edmund Stanley, Knt.	1807-1815
„ Andrew A. Cooper, „	1815-1817
„ Ralph Rice, „	1817-1823
„ Francis S. Bailey, „	1823-1824

Recorders of P. W. Island, Singapore & Malacca.

Sir John T. Claridge, Knt.	1825-1827
„ Benjamin H. Malkin, „	1827-1835
„ Edmund J. Gambier, „	1835-1836
„ Wm. Norris, „	1836-1847
„ Christ. Rawlinson, „	1847-1850
„ Wm. Jeffcott, „	1850-1855

Recorders of Singapore & Malacca.

Sir Richard B. Mc'Causland, Knt.	1856-1866
„ P. Benson Maxwell, „	1866-1867

Recorders of P. W. Island.

Sir P. B. Maxwell, Knt.	1856-1866
„ Wm. Hackett, „	1866-1867

Chief Justice of the Straits Settlements.

Sir P. B. Maxwell, Knt.	1867——

Judge of Pinang.

Sir Wm. Hackett, Knt.	1867——

ADVOCATES AND ATTORNIES.

1869.

James R. Logan.	Pinang.
Abraham Logan.	Singapore.
Robert Carr Woods.*	,,
Alex. M. Aitken.*	,,
Francisco E. Pereira.*	,,
John S. Atchison.	,,
Bernard Rodyk.	Pinang.
David Aitken.	,,
Hon. Thomas Braddell,* (Att. Gen.)	Singapore.
James G. Davidson.	,,
Wm. G. Campion.	,,
Alex. G. Baumgarten	,,
Alex. Aug. Baumgarten.	,,
Robert Carr Woods, Jr.*	Pinang.
Edwin Koek.	Singapore.
Danial Logan.,* (Sol. Gen.)	Pinang.
Horatio Baumgarten.	Malacca.
Duncan C. Presgrave.	Pinang.
Charles W. Rodyk.	,,

* These Gentlemen are Barristers-at-Law of England.

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Oriental Cases:

Court of Judicature.

PINANG.

IN THE GOODS OF ABDULLAH, DECEASED.

Will of Mahomedan alienating the whole of his property (although by the Mahomedan Law he can alienate only one third) is good pro tanto. The administration granted by the Court to the Widow revoked, and the Will admitted to Probate. 31 March 1835

Indian Law Commissioners' Report, 1842.
Morton's Reports, 19.

JUDGMENT OF SIR BENJAMIN H. MALKIN, KNIGHT, RECORDER.

This was an application to set aside the administration granted to the widow of the deceased, a Mahometan, and to admit an alleged Will to probate. There was no dispute as to the execution of the paper treated as a Will; but it was urged on the part of the widow that the Will was inoperative, as not being conformable to the rules of the Mahometan law; the fact that it was not so conformable is admitted, and the only question is, whether for that reason the Will ought not to be admitted to probate.

It would be sufficient for the decision of the present case to observe, that the will is only at variance with the rules of the Mahometan law, inasmuch as it professes to pass the whole property, and by that law, the power of the testator to bequeath his property extends only over a third part of it. As to that third part, the testator has not exceeded his power, and the Will is at all events good pro tanto. The consequence is, that the administration granted to the widow must be revoked, as having been obtained on the supposition that there existed no Will at all; and the Will must be admitted to probate (or rather, as I will mention hereafter a course slightly different adopted), as being an authentic instrument, of some force and validity; the question, to what extent it will be operative, remaining unaffected by the mere fact of such admission. This result seems too obvious to require any authority to support it; but such authority, if wanted, will be found in the case of Syde Ally v.

Syed Kullee Mulla Khan, Sir T. Strange, Rep II., 180.

As a general rule, I have been unwilling to express any opinion on points of law not necessarily coming before me for decision. And accordingly, in several cases, where the same principle as that contended for in the present case has come incidentally in question, I have avoided expressing any opinion upon it; the parties in some instances having all wished their own law to be carried into effect, and the only question having been what was its true interpretation, and in others the party insisting on the benefit of his own law, having clearly failed to make out a claim, even upon his own principle. I am not willing however, to avoid declaring my opinion in this case; partly because the expression of it, though not necessary to the disposal of the present application, may prevent the parties from having recourse to farther litigation, which otherwise must almost necessarily ensue; and partly because, as the question is not very likely again to be raised before me, I should be unwilling to have it supposed, as it easily might, from my having sometimes avoided its determination, that I felt it to be of any considerable doubt. I, indeed, have in substance expressed my opinion upon it before; and for that reason also, I am the less unwilling now, without absolute necessity, to declare it.

I refer to the case of Rodyk and others v. Williamson and others (24th May 1834), in which I expressed my opinion, that I was bound by the uniform course of authority to hold that the introduction of the King's charter into these settlements had introduced the existing law of England * also, except in some cases where it was modified by express provision, and had abrogated any law previously existing. I intimated much doubt, indeed, whether I should have agreed on such a construction of the effect of

* Vide Judgment in Regina vs. Willans. 1858. Journal of the Indian Archipelago, III. 28,35,49.

a charter had the question been a new one ; but I felt bound by the weight of authority, and decided against the continuance of the Dutch law at Malacca accordingly. The Mahometan law can stand on no better footing, unless by the express provisions of the charter ; for the statutes giving the Mahometan and Gentoo inhabitants within the jurisdiction of the King's courts at Calcutta, Madras, and Bombay the benefit of their own laws, apply only to persons so resident. The bulk of the inhabitants of India are otherwise protected.

It may be worth while, however, before adverting to the terms of the charter, to observe that though the Mahometan law cannot, independently of them, stand on a better footing here than the Dutch law at Malacca, it may very easily stand on a worse. To place it on the same, it will be necessary to prove that it existed, not as the custom of a particular portion of the inhabitants, but as the law of the place, up to the time of the first charter. I believe it would be very difficult to prove the existence of any definite system of law applying to Prince of Wales' Island or Province Wellesley previous to their occupation by the English ; but that law, whatever it was, would be the only law entitled to the same consideration as the Dutch law at Malacca ; indeed, even that would not in general policy, though it might in strict legal argument ; for there might be much hardship in depriving the settled inhabitants of Malacca of a system which they had long understood and enjoyed, but more * in requiring the persons who resorted to these new and almost uninhabited districts (for such they were when we got them) to conform, as all settlers must, unless there is an express exception in their favour, to the law of the land they settled in.

I have said that I consider myself as having, in

* ? None.—Ed.

substance, disposed of the present question in the case of Rodyk v. Williamson; for all the arguments applicable to the present case would have applied to that also, the laws, customs, &c. of the Dutch being just as much preserved to them as those of any other class of inhabitants, except inasmuch as they may be less repugnant to the English law, and therefore less frequently affected by its introduction, and the Dutch law being also, which perhaps the Mahometan law might be proved to have been here, (but that would be a matter of evidence), the law of the country before the charter. The latter argument, however, was disposed of in that case; nor was it there contended that the general words of the charter, saving to the different inhabitants their several religions, manners, and customs, had the operation now ascribed to them.

Nor, in my opinion, can any such operation be sustained. If the question were entirely a new one, it would seem to me to admit of very little doubt. The operation contended for is quite unlimited; it gives to all the inhabitants of these places the full benefit of their own laws, religions, and customs; for no line is drawn to confine the effect of the words relied on, either to any particular nations, or to any particular rights. The effect contended for therefore goes far beyond the state of the law at Calcutta, Madras, or Bombay, where the benefit, if it be one, is confined to Mahometans and Hindoos, and is limited to certain classes of rights and privileges. This is not a very probable operation of a charter made for the administration of law to a new population, and where therefore the reasons for such a reservation on the continent of India did not, at least to the same extent, exist.

I confess I am unable to see any words in the charter which can bear out such a result. The passage relied on with respect to the present question is

in page 21 "That the said court of judicature shall have and exercise jurisdiction as an ecclesiastical court, so far as the several religions, manners, and customs of the inhabitants will admit." There are, however, similar passages on other subjects in pp. 41,43,47,53; these all differ in the minutiæ of expression, but I think there can be but little doubt that they were all meant to give the same kind of protection. It would be a very dangerous way of construing a document so loose in its expression as the charter to attribute all casual variations of phrase to a definite intention of affixing a different meaning. But in the general impression the charter seems to have intended to give a certain degree of protection and indulgence to the various nations resorting here; not very clearly defined, yet perhaps easily enough applied in particular cases, but not generally, to sanction or recognise their law. In the words of page 43, respecting the criminal proceedings of the court, "due attention is to be had to the several religions, manners, and usages of the native inhabitants;" or as expressed in page 41, process is to be accommodated to such religions, manners and usages, "so far as the same can consist with the due execution of the law and the attainment of substantial justice." In this last extract "the law" is clearly distinct from those native laws which are to be favoured subordinately to it.

I see no reason to ascribe a different construction to the words giving ecclesiastical jurisdiction. And it is to be observed that in the detailed provisions respecting such jurisdiction no such words are found; they are only inserted in the general description of the jurisdiction of the court; it might therefore be open to contend that they applied only to other matters of ecclesiastical cognizance not expressly included in the subsequent minute directions. But without insisting on this, which would probably be too strict a construction, I think there is abundantly

enough in these provisions of the charter to show that no such recognition of the different laws of different inhabitants could obtain. The court here is to grant probate and administration of the wills and effects of all the inhabitants, and all other persons who shall leave property here ; the courts in the presidencies of India have such jurisdiction given them only over the estates of British subjects, and accordingly it has been held at Madras (Chalunnal v. Garrow, Sir T. Strange, II. 153, recognised in Syed Ally v. Syed Kullee Mulla Khan, Ib. 186,) that no probate or administration was necessary in the case of native estates, though the court did not refuse to grant it. In the same manner it would not be here, for certainly it is neither Malay nor Hindoo nor Chinese law that a party can have no representative character unless derived from the court of judicature established here under the charter of the King of England, and proceeding according to the law used in the diocese of London. The mere fact, therefore, that administration and probate have always been applied for, seems almost to negative, as far as general usage and understanding is material, the argument advanced.

This observation is important, because Mr. Caunter, the advocate on the part of the widow, relies much on the general practice of the Court as invalidating the Will, and recognising the national law of the testator. No decisions, however, are cited in detail, and much of the practice referred to might be only like that which has obtained before myself, that, where the parties contested a matter on the footing of their own law, the court did not interfere to insist on their adopting another. In many cases, too the laws, and usages would be material : the propriety of an administrator's account, for instance, might depend on the religious usages of his nation as to burial ; the propriety of his application of property might sometimes depend upon a native law or custom of marri-

age. And in respect of wills, to one case of which Mr. Caunter adverted rather more particularly than to any other instance, everything as far as the Will is acted on at all, must depend on its construction merely. I should say that the Court ought very readily to collect from the expression of a Will that the testator intended his property, so far as not particularly disposed of, to follow the law to which he was accustomed. Thus, in a Will very recently exhibited before me, I should have no doubt that a direction by a Mahometan, that the property should be distributed "according to the law of God," imported a distribution by the Mahometan law of descent. * If such a party disposed of the third part of his property expressly as that which only he should alienate by Will, I should treat it as a clear declaration of his expectation and intention that the rest should follow the course of that law by which, and by which only, his power was so limited. I put plain and easy cases on purpose, but the same principle would very often, in my judgment, have to be applied. But all these would be decisions not on the legality, but on the construction of a particular Will, and such, in the absence of minute information, I should believe to be the character of most or all of the testamentary cases referred to.

On the whole, I should entertain little doubt on the question, had I not the authority of Sir Ralph Rice against me. I cannot, however, but think, that though his opinion undoubtedly differed in some degree from mine, it must either be inaccurately reported in the passages referred to by Mr. Caunter, or else must have been given without reference at the time to the provisions of the charter under which he had then ceased to act for nearly seven years. I come to this conclusion, because I find him drawing a marked distinction between the civil

* Et vide Judgment in Regina vs. Willans, 1858. 3 Journal of the Indian Archipelago, N. S. 44.

and criminal law, for which, even independently of the general principle already adverted to, of putting the same construction on provisions generally similar, I do not find that warrant in the special wording of the charter which he seems to have considered to exist. With respect to the criminal law, Sir R. Rice (Art 1386, p. 174, of the Evidence before the House of Lords, 1830) expresses himself in a manner not much differing from my own, though corresponding perhaps to a rather wider interpretation of the clauses protecting the natives. But he draws a distinction between the criminal law and that affecting civil rights, with respect to which he says, that the court was bound by the clause in the charter to administer the law to every part of our mixed population according to their respective laws and customs. Now, in the detailed provisions as to the prosecution of civil suits, no reference whatever is made to the religions, manners or customs of the parties except as to the administration of oaths and the framing of process, where the passage in page 41, already referred to, is to be found. And in the general description of the jurisdiction of the court nothing of the kind is said in the enumeration of the causes of action and parties subject to it, and the words of the clause giving it the same authority as the courts of common law and equity in England are only that these powers are to be exercised "as far as circumstances will admit." The distinction therefore between the civil and criminal law would seem to be rather against than in favour of the more extended adoption of the native laws into the former; and I cannot therefore but think that there must be some error, either in the report of the learned judge's examination, or in his recollection of the words of the charter.

Still it is evident that his practice must have been in some degree contrary to the opinion I have expressed. Under these circumstances, I cannot but distrust my own judgment; still, as the case, inde-

pendently of this one authority, seems to me a clear one, I must act on my own impression. The question will probably still be considered doubtful, but I ought not, at all events, to leave it as one where a decided opinion had been expressed on one side only, when my own is equally clear on the other.

It may be desirable to call to notice, that it is the fault of native holders of property if any inconvenience result from the present decision, supposing it to be established as law. The law to which I consider them as subject gives the most unlimited freedom of disposal of property by Will; and any man therefore who wishes his possessions to devolve according to the Mahometan, Chinese, or other law, has only to make his will to that effect, and the court will be bound to ascertain that law and apply it for him.

The general result is, that the administration granted to the widow must be revoked, the Will of Abdullah being established as a valid instrument. Still it does not appear to me to amount to a complete will, constituting Growk the executor of all his property; it is only a disposal of part in his favour, and contains nothing to show that he was intended to have the general management; if not, he is not designated as executor, and he can only obtain administration with the will annexed in the usual manner, by giving notice and filing a proper petition. The present petition may, however, if he wishes it, be amended to that effect, without payment of costs. But it is necessary to observe that the widow may very probably have a better claim to administration with the will annexed than he, if she wishes to dispute his right. Where the testator constitutes an executor, the court has nothing to do with the selection; the Will, if effective at all, is effective in that particular. But where the will appoints none, and administration is therefore necessary, the court has its usual duties to perform, and

the parties their usual rights to enforce. The fact that the testamentary paper gives a benefit to a particular individual, may, according to the circumstances of the case, be a strong reason for either selecting him for the administration, or for excluding him from it. But the regular course of petition and notice must be adopted, to give the parties interested an opportunity of coming in and urging their claims.

The prayer therefore of Growk's petition is granted, as far as it respects the revocation of the administration granted to the widow. As far as the grant of any powers to himself is concerned, the petition must be amended. It would be premature to make any order about the costs, while it is yet uncertain who will have the general management of the estate. But I entertain no doubt that the widow will finally be entitled to receive the costs of her present opposition out of the estate. The question must at least be considered as one very fit for discussion; and the estate therefore may properly be charged with the costs incurred, in consequence of the doubtful legality of the course adopted by the testator.

COURT OF JUDICATURE.

MALACCA.

In re Chu Siang Long's Estate.

Adopted children of a Chinese entitled to joint administration of his Estate in preference to his nephew.*

Pinang Gazette, 20 Feb. 1858.

Memo by the Senior Sworn Clerk for the information of the Honorable the Recorder.

Estate of Chu Siang Long, deceased.

Letters of Administration ad Colligendum having been granted to the Senior Sworn Clerk for the time being, the Resident Councillor is desirous of ascertaining to whom the assets realized, viz. drs. 2441.88 and half, after liquidating all debts up to this date, should be paid ; whether to the natural and adopted daughters of the deceased and to his adopted son jointly or to his lawful nephew, and whether the English or Chinese Law and Custom is to prevail in this instance at Malacca. See Minute Book herewith sent Vol. 5th, Pages 316,317,319 and 320 together with the Papers filed in the above Estate. I am informed that the Parties interested will file a Petition on or before Tuesday next touching the distribution of assets.

Court House, 29th April 1843.

SATURDAY.

I find, on reference to a note made by me on the 23rd August last, that I have already in effect decided this question, by giving it as my opinion that Chu Sing Kee and Chu Gan, the adopted son and daughter of deceased, who had applied jointly for Letters of Administration to the Estate, were entitled to administer in preference to the nephew Hee Toh Sing. For the same reason I think the assets

* This decision has been subsequently overruled, see Judgment in Reg. vs. Willans, 3 Journ. Ind. Archip. 41 where it is stated by the Judge "I then (1858) held that the adopted son of a Chinaman domiciled here was not entitled, in that character, to administration, or to a distributive share of his adopted father's land." And see also pages 40,45 and 46 of the same Judgment on the subject, and see in the Goods of Meh Allang, post App. III.—Ed.

should be divided between the son and daughters and that the nephew is not entitled to share with them. The ground of my decision is that I take the same view of the Charter as Sir B. Malkin did with regard to the Law to be administered in these Settlements under that instrument, and which cannot be better expressed than in his own words. In his able Judgment in the Goods of Abdullah in March 1835 Sir Benjamin observes "In the general expression the Charter seems to have intended to give a certain degree of protection and indulgence to the various nations resorting here, not very clearly defined, yet perhaps easily enough applied in particular cases, but not generally to sanction or recognize their law." And in his letter of the 17th July 1837 to Mr. Secretary Prinsep he remarks as follows "But with respect to the Law whereby rights are constituted and established, I understand the Governor General to consider that it at present is, and ought in general for the present to continue, the Law of England; modified indeed by considerations how far some of its particular provisions and enactments are suitable to the circumstances of the Colony, and administered in all cases with large and liberal regard to the manners, usages and religions of the different nations subject to its operation, but containing no provisions or principles which cannot be based upon that Law, so modified and construed." "It would seem very difficult, for instance, to refuse to treat a Hindoo son by adoption as a son and consequently as an heir in the absence of other sons; or to declare the eldest son of a Mohometan not to be the heir, because his father had two wives at once, and he was the son of second marriage." * In the 5th Paragraph of the Report made on the 8th February 1842 by the Law Commissioners on the Judicial Establishment of the Straits, they express their concurrence in Sir Malkin's view of the spirit

* See Judgment in the goods of Lao Leong An (1867) post.

in which the law of England should be administered in these Settlements; and I have myself adhered in practice to the same principles, frequently directing the 2 or 3 widows of a Mahomedan Intestate to rank as one widow, and their several Children as one family, in the distribution of the Estate. In one of the Petitions in this case, that of Gan Nio, dated 25th August 1842, the case of Mootoo Vallee is cited to shew that a natural daughter has been considered as legitimate for the purpose of inheritance.

I am not aware of that case (which I suppose however, is among the Malacca Records), but repeat, for the reason above stated, that the adopted son and daughter are, in my opinion, alone entitled to the Assets.*

WM. NORRIS.

MALACCA, 3RD MAY 1843.

* See Judgment in Reg. vs. Willans (1858) 3 Journ. Ind. Archip. 47 note b, where the Chinese law is stated to be unfavorable to even legitimate daughters, except on failure of male relatives.—Ed.

COURT OF JUDICATURE.

SINGAPORE.

In re Chong Long's Estate.

Will by a Chinese directing rents and profits of his lands in Singapore to be expended in the performance of "Sinchew" ceremonies, to the memory of himself and his deceased wives,—upheld.*

Straits Times, 14 July 1857.

On Thursday the 25th June the Hon'ble Sir Richard McCausland, Recorder of Singapore, gave judgment in a case which has been pending some years in the Court, but which from various causes, as the death of some of the parties, the decease of the late Recorder, caused frequent postponement. The question at issue was one of the highest importance to

* This case has been overruled by Choa Neow Neo vs. Spottiswoode, post App. I.

the whole native community, involving the appropriation of the estates of deceased persons to the performance of the peculiar religious observances of the deceased directed by the Will. The suit in question related to the estate of Choa Chong Long, a wealthy Chinese, a native of Malacca, who left a large property, the rents and profits of which he directed to be expended in the performance of certain ceremonies called "Sin-chew," to the memory of himself and his deceased wives; or in other words he directed that ample provision should be made, out of his estate, for the purpose of feeding his own ghost or spirit and the spirits of his deceased wives—an idea universally believed by Chinese, who deem it a disgrace for the spirits of their ancestors to beg of other spirits either food, raiment, money, or other things which they believe to be necessary to the spirit after its departure from the body. These spirits are said to hover near the abode of the living relations, and are fed by the savour of cooked meats, whilst clothes and money are transmitted though the medium of burned papers on which are drawn different articles of clothing, square marks of gold and silver foil, piles of which may be seen burning in our streets almost every day, in front of the Chinese houses and shops, or at the grave-yards. The savour of the viands having been partaken of by the spirits the grosser parts are eaten by those who perform the ceremony, and various criteria are laid down for determining when the spirit is satiated; if the indications are unfavorable more pigs, ducks, cakes, &c., are prepared. No deity is invoked during the ceremony—the whole object of the festivity being to satisfy the necessities of the spirit: and the performance of this duty is regarded as the highest evidence of filial duty and obedience.

We have penned the foregoing explanations for the purpose of making our distant readers acquainted with such particulars as will enable them to un-

derstand the learned Recorder's judgment, as also to illustrate to what extent the free toleration of religion is allowed under British rule.

The Will of the Testator in this case bears date the 24th September in the Year of the Christian Era 1836. It is written in English, and was prepared by some person acquainted with the forms of English Conveyancing, and its Execution is witnessed by 3 English gentlemen resident at the time at Singapore.

The Testator declares, that he makes his Will for the "avoidance of all controversies and disputes of and concerning his wordly substance and property after his decease," and then proceeds to give legacies of drs. 500 a piece to each of his 6 children therein named, viz. 2 Sons and 4 Daughters; and he declares these several sums of money are given to his said sons and daughters in full of all claims, either in Law or in Equity, or by any usage or custom, upon his Estate or Property after his decease in any wise howsoever: and further that none of his sons or daughters already mentioned, nor his son therein after mentioned, should be permitted in any wise, or at any time thereafter, to interfere or intermeddle with his Estate or Property after his decease; and the Testator then directs a sum of 15 Dollars per month to be paid to the aftermentioned son, during his life, and a moderate sum for the expense of his funeral, as his said last mentioned son was unable to earn any subsistance or provide for himself.

The Will then recites that the Testator was possessed of certain Houses and Immoveable Property at Malacca, and also of certain Houses, Shops, Bazaars, and Plots of Ground at Singapore, on one of which plots situate under Government Hill, and immediately adjoining Campong Malacca, he was then erecting a Building for Charitable purposes and for the performance of Religious ceremonies, according to the custom of his ancestors, called Sin-Chew, to

perpetuate the memories of his departed wives, and also of himself after his decease; and mentions that he had in addition to his children already named, another son of the age of five years, who was an object of his especial affection, and for whom he intended to make a particular provision; and directs that all debts due to his Estate should be called in, and all his Moveable Property be converted into money, and that out of the proceeds thereof as well as out of whatever funds of his might be in the hands of himself or of his Agents or Executors at the time of his decease, the aforesaid legacies should be paid to his 2 Sons and 4 Daughters; and that after such payment the clear residue thereof, not including his House or Lands in Singapore or Malacca, should be ascertained, and that one-half thereof should be paid to his favorite son absolutely, but in case that son should not live to attain his full age, then that such share or moiety intended for him should become applicable to the Charitable purposes after mentioned, and the other half thereof the Testator directed should be invested in the names of his Executors and Trustees after mentioned either in the Security of the East India Company or in other good and sufficient Security bearing interest, the whole of which said Interest, subject to necessary charges and also to the monthly payment therein after directed to be made, was to be expended in such Sin-Chew or Charity in and to the names of himself and of his wives already mentioned, such Charity to be performed 4 times in each year at the least, and as much oftener as the funds applicable thereto would admit of, at the building so erected by the Testator for such purpose as before mentioned.

The Testator then wills and bequeaths the whole of his Landed Property, (except one House and Garden in Singapore which he directs to be sold and the proceeds to be subject to the general purpose of his Will), to 3 English gentlemen, their Heirs, Ex-

ecutors and Administrators for ever, upon Trust, to receive the Rents, Issues and Profits thereof, and thereunto to keep the Premises in repair, and to insure the same against fire, and after deducting same and all other necessary expenses, to pay one moiety of the clear residue of such rents, &c., to his favorite son half yearly, and not oftener, during his natural life; and the other moiety to be laid out and appropriated in the performance of such Charity as is therein-before directed and mentioned; and, subject to the monthly payment of the 15 dollars and the deductions above mentioned; from and after the decease of his favorite son, the whole of the Rents, &c., to be expended in the performance of the same Charity under and subject to the control and management of his Executors and Trustees, or any person or persons duly delegated by them for that purpose.

The Testator then declares it to be his Will and wish that the Governor of P. W. Island, Singapore, and Malacca, or the Resident or Deputy Resident Councillor of Singapore, or one of them, according to seniority, and being willing to act, should be a Trustee or Trustees of his Will, to see his said Charity duly administered and faithfully carried into effect, according to the mode practised in cases of Native Charities, and Charitable Institutions, at Calcutta, Madras, and Bombay, and permanently established under the orders of the Supreme Court of these Settlements, or of the Supreme Court of Judicature of Bengal, if his Executors and Trustees should deem it advisable, or necessary.

The Testator then directs that his Houses and Land should remain in his own name for ever, according to the tenor of the original Grants thereof, and then constitutes the 3 English Gentlemen before named, viz. Samuel George Bonham, Richard Fownes Wingrove, and William Spotiswoode, Esqres., Executors and Trustees of his Will; but that

in case Bonham and Wingrove should not be in the Straits at the time of his decease, then that the Governor of the Settlement, or the Resident or Deputy Resident Councillor, or the Senior Authorities at the Straits or some or one of them, or the professional Judge, Justice or Law authority, at the time of his decease, should be executors and Trustees and to see the same carried fully into effect; his will and wish being to preserve the funds intended to be applied by him to such Religious and Charitable purposes as aforesaid from being embezzled or made away with by his sons, daughters, and relations, or otherwise diverted from the said purposes, doubting not but that the East India Company and those in authority under them would by due enforcement of Testator's Will, encourage wealthy, honest and industrous Chinese and other settlers in the East India Company's territories to follow Testator's example, and thereby ultimately advance the wealth, prosperity and permanency of their possessions in these parts.

The Testator died on the 18th December, 1838 at Macao, in China, and Probate of his Will was granted to Mr. Spottiswoode, one of the Executors therein named, on the 11th February, 1841, saving the rights of the others Executors named therein.

The son to whom the monthly payment of 15 dollars was made died in the month of June 1850, and the favorite son died on the 10th July 1855, leaving a widow and an infant son of the age of 2 years and upwards.

After the death of the Testator various applications were made to the Court from time to time on the part of the heirs * of the Testator to have a share of the Sin-Chew Fund paid to them, in order to enable them to perform the ceremonies to the memory of their deceased parents; and on the 4th December 1854 a Reference was made to the officer of the

* Sic.

Court to inquire into and report upon the nature of the religious ceremony of the Chinese called Sin-chew, and observances and objects, and whether it partook in any manner of the nature of a Charity, and if so, whether any particular Charity consistent with the religion, manners, and customs of the Chinese, was intended by the Testator in his said Will.

In obedience to this order a Report was made by the Registrar of the Court, dated 24th August 1855, setting forth the nature of the Religious Ceremony of the Sin-chew, and the evidence on which that Report was made.

The Report found that the Sin-chew was a religious ceremony of the Chinese in commemoration of the decease of their ancestors; that it did not partake of any Charity, and that the word Charity must have been introduced by the writer of the Will under some misconception of the Testator's meaning.

On the return of this Report application was made by Petitions to the Court on its Ecclesiastical side, on behalf of the claims of the Daughters of the Testator and their husbands, and of the widow of the favourite son (then late deceased) and his infant child, that the Testator should be declared to have died intestate as to the sums of money and other property bequeathed by him for the purpose of the Sin-chew. These Petitions were severally heard and supported by able arguments before me,* by Mr. W. Napier, on behalf of the widow and infant son of the Testator's favorite son, and by Mr. Aitken and Mr. Earl for the daughters of the Testator, and were strenuously and ably resisted by Mr. Woods on behalf of Mr. Spotiswoode, the acting Executor of the Will, by whom the affairs of the Testator have been administered, and the accounts of the Estate have been duly kept, and rendered to the Court from time to time.

From the Report of the Registrar it is clear that this is not a Bequest to which the Court of Chan-

* Sir R. B. McCausland, knt. Recorder of Singapore.—Ed.

cery in England would give effect. No words have been used by the Testator which could control the applications of the Fund to the purposes of Religion, (such as that Court would recognize), or for the education of Youth, or for the benefit of the Poor. Neither are there any Charitable, Beneficial or Public Works designated by the Testator which that Court would carry out. It is, accordingly, strongly pressed on behalf of the daughters of the Testator, and of the widow of his favorite son and her infant child,—parties for whom provision has been made by the Testator, and who are prohibited by the terms of the Will from interfering or intermedding, in any wise, either in the Testator's Estate or Property, after his decease,—this bequest, being for a superstitious use, according to the English Law, should be declared by this Court to be void, and that the next of Kin of the Testator became entitled to the property.

This proposition appears to be based upon entirely too narrow a ground. The application of the principle contended for would prohibit any Testamentary appointment being made for the observance and performance of any of those rites and ceremonies which are deemed essential to their welfare and happiness, as well during life as after death, by the countless multitudes of Asiatics who are under British rule, but living according to their respective religions, manners, usages; and if pushed to its extent, in the present case, would prevent even the repair or improvement of the building which the Testator had erected for the performance of Religious Ceremonies according to the custom of his ancestors, and in which such ceremonies have been performed with the sanction of this Court, by persons duly delegated by the Executor for that purpose according the Testator's Will.

By the Royal Charters of 27th November, 1826 and 10th August 1855, this Court is authorized to exercise the same Jurisdiction in Civil and criminal

cases, as in exercised by the High Courts of Chancery and the Supreme Courts of Common Law respectively in England, as far as circumstances will admit; and by the same authority, this Court has and exercises an Ecclesiastical Jurisdiction, "so far as the several religions, manners, and customs of the Inhabitants of the Settlement will admit."

The proposition contended for assumes that by this authority, the provisions of the several English Statutes against Bequests to superstitious uses, of Mortmain, and against accumulations of Income, have been respectively transferred to India, as part of the Law of England.

Now, independently of the exceptions contained in the Statute of Mortmain in favor of the two Universities, and certain other seats of learning; and of property in Scotland, and of the several exceptions which have from time to time been engrafted on it; it has been holden, that as the Statute is Local, it does not extent to prohibit disposition of real Estate, or personal property connected with real Estate, in Ireland (a) or in the West Indies, (b) or in the East Indies (c) or to the Colonies (d).

Looking therefore to the history of this country, it appears to have been the policy of the framers of the Charter to induce as many persons as possible to become resident in the Settlement, and not interfere with the observance of their several religions, manners, and customs, nor with the free disposition of their Houses, Lands, or Moveable Property;—and considering the grounds of the decisions above refered to, and that the Statutes against superstitious uses, and the accumulation of Income are Laws wholly English, and incapable * without great incongruity of effect, of being transfered, as they stand, into the code of the Country inhabited by people of so many different religions, manners and usages,

* But see obiter dictum in the Judgment of Reg. vs. Willans (1858) 3 Journ. Ind. Archip. 38.

the Court is of opinion that it is bound—though not entirely without doubt,—to declare this bequest valid, and to give effect to those provisions of the Charter which would otherwise be rendered wholly nugatory and inoperative, and which direct that—"all or any of the powers thereby committed to the "Court shall be executed with an especial attention "to the different religions, manners and usages of "the person who shall be resident or commorant "within its jurisdiction, and accomodating the same "to their several religions, manners, and usages, "and to the circumstances of the Country, as far as "the same can consist with the due execution of "Law, and the attainment of substantial justice."

COURT OF JUDICATURE.

Prince of Wales' Island.

Nonya Siu vs. Oothmansah Merican.

Subsequent Marriage by Chinese females in this Colony, after divorce, valid. The law of China and the local custom as to guardian for Marriage (Wallee as it is termed in Mahomedan law), considered.

Pinang Gazette.

Judgment of Sir P. Benson Maxwell, Knt. Recorder.

Nonya Siu was married to Lim Bun, left him, and lived afterwards with Hui Sian till his death. In 1845 a deed was executed by her and Hui Siau conveying certain lands and tenements to the defendant, and the chief question in this cause was whether the conveyance was binding on her, as being a married woman at the time when it was made. The marriage to Lim Bun was admitted; but it was asserted on the plaintiff's part and denied on the defendant's, that she had been divorced by her first husband and married to Hui Siau. The plaintiff alleged that she

had been divorced by mutual consent, according to Chinese law; that the cause of quarrel between herself and her husband which led to the divorce, was, that he complained of her indolence; that after the divorce she lived for a year with her sister Nonya Lian; and that at the end of that time she married Hui Siau. On the defendant's part evidence was adduced to shew that the cause of quarrel was that the plaintiff had been detected carrying on an intrigue with Hui Siau, and that while she stayed at her sister's Hui Siau lived with her, and after a time both took up their abode in the town, and afterwards in Batu Uban. Evidence was also given on both sides as to reputation, some of the witnesses alleging that the two passed as man and wife, while others had always understood that the plaintiff lived with Hui Siau as his mistress (ikot sama dia). Chinese witnesses were examined on the subject of the Chinese law; but the evidence shewed that their information was of the slightest character. Some of them went even so far as to deny that a divorced woman could marry again. It is unnecessary, however, to refer further to the evidence, as the Recorder relied solely on Staunton's translation of the Chinese Penal Code.

The case was heard at the last December sittings, and the Recorder took time to consider his judgment. On a subsequent day the learned Judge, in delivering judgment, said that he considered that the divorce had been clearly established. The question was whether the alleged second marriage had taken place. The Chinese law permitted a woman to marry a second time, unless she had received an honorary title from the Emperor during her first husband's life (Staunton's Penal Code p. 112.) But to render the second union a marriage, there must be a person to give the woman away to the new husband and a delivery of marriage presents, otherwise it was considered simply as a case of concubinage.

(Ib. p. 113). If this rule were in force here, it was plain that the marriage set up could not be sustained, for the plaintiff admitted that neither her uncle, the head of the family, nor any one else, gave her away. But the rule could not be held essential here under English law, where a very different degree of liberty and respect was accorded to women than in China or other part of the East. In China a woman appeared to be, as in India, in a state of perpetual tutelage, and to be either under a general incapacity to contract, or to have no right to dispose of her person as she pleased. The necessity of giving away was not so much a part of the ceremony as a consequence of the general law relating to the status of the woman. But here this must be determined by English, and not by Chinese law. It must be taken, therefore, that the uncle's not giving her away did not make the ceremony a nullity, if in other respects it was a valid marriage.

The question however, remained, had the plaintiff ever been married to Hui Siau ; and on this point the evidence was conflicting. The plaintiff said that several persons were present at the marriage ; Nonya Engku, Nonya Luan, her sister Chiah Lian, Chau Su Phan and Chiah Hin. The two latter were dead. Lian denied that she was present. Engku was not called. Tian Tek, who was said to have been at the feast, denied that he was. The only persons who gave any evidence in the affirmative were the wife of an actor who said that she was sent for the bride, a man who said he carried trays to her house with candles, pigs-feet and fowl in the morning, and assisted in laying the table for the feast in the afternoon, and one of the guests who said that he was at the feast. It was not improbable that there was a feast at some time ; but though that might be some evidence of a marriage having taken place, it did not constitute a marriage. On the other hand, Nonya Lian positively denied that she was present.

The plaintiff admitted that Nonya Sin, another sister, was not there; her half sister Nonya Eh Long was also absent; so that the evidence before the Court failed to shew that any of her relations were present. Again, though he was of opinion that it was not essential to the marriage that the woman should have been given away by her uncle, yet the fact of her not having been so given away, according to the usage of her country, had a very material bearing on the question whether there had been any marriage de facto. The Chinese were more than any other people attached to their usages, and the admitted absence of the uncle therefore threw great doubt on the question. Besides, looking to all the circumstances, was it likely that there was a marriage? From the evidence, though conflicting, he had no doubt that these was cohabitation before the marriage. The divorce paper did not mention the adultery, but it was natural that it should not. But it was more probable that this was the real cause of the divorce than the indolence of the wife, or her temper, as she alleged, especially as several witnesses had spoken to the fact of the adultery. If there had been a marriage, one would have expected that the family would have taken care that it took place as publicly as possible and with full ceremonies. The whole object of it would have been that the woman's position in life should be rehabilitated, and that the marriage show throw a veil over her previous misconduct. This assumed, indeed, that the woman and her friends were sensitive on the subject of marriage or no marriage. But it appeared clearly in this case—as it had appeared in every other case in which the subject had been mentioned in Court—that the Chinese (of this place at all events) visited with no social ban or degradation, women living in a state of concubinage. Their wives visited them and associated with them on terms of equality. They were addressed as wives (bini). There

appeared to be no inferiority in their social status. What object then could there have been for a marriage, after living for a year with the man, as the plaintiff would appear to have done? None apparently, and coupling this with the important fact that the woman had not been given away by her nearest male relative, with the absence of all publicity, and with the fact that no witnesses had spoken to the marriage but the actor's wife and the man who carried the tray with fowls, &c., while of others said to have been present, some denied it, and some were not called, he (the Recorder) must come to the conclusion that there was no marriage.

COURT OF JUDICATURE.

PINANG.

THE HON. SIR BENSON MAXWELL, KNT., RECORDER.

Hawah v. Daud.

Mahomedan Married Woman's Personalty * is her own separate Property and does not belong to her Mahomedan husband by marital right. The Mahomedan law considered. 9th March, 1865.

Pinang Gazette.

The petition in this case alleged that the plantiff, being seised and possessed of real and personal property, married the defendant some years ago. The latter was without property; his occupation in life was that of a police peon. He left the police shortly after his marriage, and until about a year ago lived with his wife, and upon her property. A year ago, he got possession of her title deeds, gold ornaments and money, divorced her, and turned her out of his house. In his answer, the defendant alleged that the ornaments had been purchased by him, that the money which he had taken was his own and had

* As to her realty or lands in the Straits see Cader Meydin v. Shatomah (1868), post, and Judgment in Reg. v. Willans. 3 Journ. Ind. Arch. N. S. 45. 46.

never been his wife's and he denied the divorce and expulsion. The object of the suit was to recover the property taken and for this purpose that the defendant might be declared a trustee for the plaintiff.

The Recorder said that he had no doubt upon the facts of the case; and after examining the conflicting statements of the parties, he held that those of the plaintiff were substantially true, and those of the defendant unworthy of credit; except as to the subject of divorce, as to which, he said, it was unnecessary to express any opinion.

He proceeded, then, to observe that the legal question which was raised by the petition, was one to which he had often given consideration before this suit. By the law of England, the husband on marriage became seised of the wife's real estate during the marriage, or for his own life, if a child was born alive. He became, further, upon the marriage, absolutely entitled to all her personal effects, and to all the debts owing to her, and other rights, which were reducible, and which he reduced into possession during the marriage. He became bound, on the other hand, to support her during the marriage, that is, during her or his life. He also became bound for her debts contracted before marriage; but that liability lasted only as long as the marriage; as soon as the marriage was at an end, his liability was at an end also. Whatever might be thought of this state of law, as regarded the wife, it was at all events, the law of a people which whom the marriage contract was once indissoluble, and if dissoluble now, was only so for the greatest breach of it by the wife, or at her express instance, and not by the party, but by a Court of Justice. But according to the Mahometan law and Mahometan usage, marriage was a contract dissoluble at the will and pleasure of the husband, and dissoluble by himself. He had but to pronounce the word and the marriage was at an end.

On the other hand, the Mahometan law threw its protection over the wife, leaving her in full possession of all her property, rights and ability to contract. To call such precarious unions by the same name as our own marriages, was, perhaps to give one name to two very different things (see Lord Brougham's judgment in Warrander v. Warrander 2 Cl. & F. 448).* But still, that the Mahometan marriage was a good marriage in the eye of our law seemed incontestable; at all events it could not be contested here, without bastardizing the mass of the population. And the validity of the divorce was equally incontestable. A resumption of co-habitation without re-marriage would be against the Mahometan law and religion, and it could not be enforced by our Courts. The question which then arose was whether the marital rights of a husband over his wife's property were the same in Mahometan marriages as in the indissoluble, or virtually indissoluble marriages of Christians. If they were, a Malay, under the combined operation of his own religious law and of the law of the Settlement, was able to strip a woman of all her personal property, and after the birth of a child to keep her real estate, also, for his life, and at the same time to turn her out into the street penniless, absolving himself, by the same step, from liability for her antenuptial debts. If such consequences were the logical result of such a state of law, there were assuredly grounds for pausing before holding that the law was so. It seemed to him that it might be that the Mahometan marriage was a good marriage as regarded its essential character, sanctioning and legalizing the union of the man and woman, and legitimising their offspring, and yet not be that species of marriage to which the legal incidents as to property, rights and disability attached. Or it might be that if the husband was at liberty to dissolve his marriage, he be-

* Et vide Judgment in Reg. v. Willans (1858), supra, 43,44.

came impliedly bound, on exercising that power, to restore his wife, as regarded her property and rights, to the position or condition in which she was before the marriage, or (what would be the same thing) to place her in the position in which she would be under the Mahometan law, upon the divorce. It was not, however, necessary in the present case, to determine whether any of these views were well founded; for if the property and rights of the Mahometan wife vested in her husband in the same manner as those of a Christian wife, at law, there would yet be good ground for holding that the man in whom such property and rights become vested by virtue of a contract which he was at liberty to rescind at his pleasure, impliedly undertook to hold them as a trustee for the benefit of his wife, in equity, in the same manner and to the same extent as the Mahometan law gave them, or left them to her, on her entering into the Mahometan contract of marriage. Implied contracts and implied trusts were not strange either at law or in equity. In equity, if one bought and paid for an estate in the name of a stranger, or conveyed it to him without consideration, the latter held it as a trustee for him, or as the expression was, there was a resulting trust in his favour. When freehold land was purchased by partners for partnership purposes, though at law they might be joint tenants of it, equity impressed the property with the character of personalty. When a husband died without having obtained administration to his wife, her administrator was in equity a trustee for his personal representative. In these and a multitude of other cases, implied trusts were raised to obviate injustice and meet the presumed wishes of the parties, or what would have manifestly been their wishes if the question had occurred to them. The Recorder thought that the same principle might be applied to cases like the present. In any view of the case, however, whether the wife's property remained her

own at law, unaffected by the common law rules which gave the husband certain rights over it in Christian marriages, which was perhaps the true view, or whether the husband was under an implied contract or an implied trust, it seemed to him (the Recorder) that the plaintiff was entitled to the relief prayed in her petition. He would therefore order the defendant to deliver up the ornaments and money to his wife, in the same manner as he (the Recorder) would have ordered him to do so if they had been settled to her separate use and for her own personal enjoyment, and he should restrain him by injunction from receiving the rents and profits or otherwise intermeddling with the real estate of the plaintiff.

COURT OF JUDICATURE.

MALACCA.

Chulas and Kachee v. Kolson binte Seydoo Malim.

Plea of Coverture by a Mahomedan married woman is no answer to an action on her Bond.

Singapore Daily Times, 20th March, 1867.

JUDGMENT OF SIR P. B. MAXWELL, KNT., RECORDER.

In this case, which was tried before me lately at Malacca, the question arose whether to an action on a bond, a plea of coverture, by a Mahometan woman, was an answer to the action, and I took time to consider my decision.

The question how far the general rules of the law of England are applicable to races having religions and social institutions differing from our own is of occasional recurrence in this Court, and it is seldom free from difficulty. It has been repeatedly laid down as the doctrine of our law that its rules are not applicable to such races, when intolerable injus-

tice and oppression would be the consequence of their application. Thus, in the case of the Advocate General of Bengal v. Ranee Surnomoye Dossee, 2 Moo. N. S. 22, it was held that the law which imposes the penalty of forfeiture of property for suicide, was inapplicable to Hindus. The absurd injustice of punishing a Mahometan for bigamy or polygamy is another and familiar instance of a portion of our law being inapplicable to a part of our population and therefore not applied to them. If the criminal law may be made to bend in this manner to the exigencies of natural justice, the civil law must be at least as flexible, and where our law is wholly unsuited to the condition of the alien races living under it, their own laws or usages must be applied to them on the same principles and with the same limitations, as foreign law is applied by our Courts to foreigners and foreign transactions. They must be regarded as persons having foreign domicils and governed for many purposes by this law, and as if they were residing among us temporarily.

Having this rule in view, I came to the conclusion, in a case of Hawah v. Daud,* which came before me in Pinang two years ago, that the rule of English law which vests in the husband various rights in the property of his wife were inapplicable to a Mahometan Marriage. Considering that by our law a husband is seised of his wife's freeholds during the marriage, or during his life, if a child is born alive, that he is not only entitled to enjoy but even to dispose of her chattels real, during the coverture, and that he becomes absolute owner of all her personal property in possession, and of all "in action" which he reduces into possession during the marriage, being liable for her antenuptial debts and engagements only as long as the marriage lasts, it appeared to me impossible to hold that such a state of law could be applied to a marriage dissoluble at the will of the

* Vide ante page 26.

husband, without intolerable injustice to the wife and to others. Our law, transmitted to us from early times and a rude state of society is, indeed, so little suitable to ourselves now that no woman with property can, without great folly leave it, on marrying, subject to that law; and settlements are necessarily made to protect her fortune from its operation. But if she is so improvident as to neglect this precaution, the contract of marriage is at least, indissoluble (or virtually so) and she acquires that right of being maintained by her husband during his and her joint lives. The Mahometan woman's contract is wholly different; it may be dissolved at any moment by her husband, and her right to maintenance goes with it. But on the other hand, her right of property and her powers of contract are unaffected by the marriage; under Mahometan law she remains in this respect like an English feme sole. We have never questioned the Mahometan husband's right to exercise that power of repudiation which is one of the incidents of the Mahometan marriage; why should we question any of the other incidents of that contract? why should the right of the husband be left unaffected by our law, but those of the wife be denied or ignored? It seems to me that it would be as illogical and unscientific, as it certainly would be oppressive and unjust to give to the husband all the rights both of a Mahometan and of a Christian and at the same time to take from the wife her rights as a Mahometan and impose on her the forfeiture and incapacity which fall by our law on Christian women. If the Mahometan law were to prevail as regards the husband's right of repudiation, but the English law were to prevail in all that regards the property and status of the wife, it would follow that every Mahometan husband would have it in his power, not only to cast off under his own law, his wife whenever he pleased, but by force of the Christian law to send her into the world stripped of all her personal pro-

perty and of her real property too, for the rest of his life, if she had the misfortune to bear him a child; absolving himself by the same act from the obligation of paying her antenuptial creditors with her money. Whether the mischievous consequences of thus attaching to one contract the incidents of another might not be adequately averted by the means by which many hardships of the common law have been at various times averted at home, viz: by creating an implied trust or an implied contract, is a question which I have not omitted to consider; but it seems to me that to meet the evil in this way would be to deny that general rule which I mentioned at the beginning as a recognized part of our law which makes the common law so flexible and so adaptable to the various races subject to it; and the conclusion to which I have come is that at common law, and without any recourse to equity or to equitable doctrines, the rules which vest in the English husband various right in his wife's property do not apply to a Mahometan marriage, but that her property continues vested in herself in the same way as if the Mahometan were the law of the land.

The question now before me is whether a Mahometan married woman is under any disability to bind herself by a bond. Here again, if the question were brought within the operation of the principles of Courts of Equity, the woman would be liable as far as her separate property extended to the payment of this bond, and to the performance of her general engagements; Hulme, vs. Tenant 1 Bro. C. C. 16, Murray vs. Barlee, 3 M. and K. 223. But I see no necessity for resorting to equity. It seems to me that the question of her capacity or incapacity to contract must be determined, and for the same reasons, like that of her rights to property, by the law which governs her contract of marriage, viz: the Mahometan law; and for these purposes the Mahometan subjects of the Queen here must be consi-

dered as governed by the law of their religion in the same manner as the rights and capacities of a foreign husband and wife are governed by the law of their Matrimonial domicil. A foreign woman could not set up, any more than an infant, her disability to contract unless the law of her own country incapacitated her from contracting, Male vs. Roberts, 3 Esp. 163; and if, as is the case, the Mahometan law does not impose on her that disability, her plea of coverture is no answer to the action.

Indeed, it is not necessary in support of this view to seek for analogies in cases to which foreign law is applied on principles of comity. We have at home exceptions recognized by the common law to the married woman's general incapacity to contract. Thus, by custom, in the City of London, when she carries on a trade there on her own account, she is competent to bind herself by contracts in that trade; and if she is impleaded in the City, she pleads as a feme sole, and if condemned, is committed to prison till she make satisfaction, and the husband and his goods are not chargeable; Lavie and another vs. Jane Cox, 3 Burr. 1776. The wife of an alien enemy or of a transported convict is equally competent. I see therefore, no anomaly in holding that a Mahometan married woman is left unaffected by English law as to her capacity to contract as well as in respect of her rights of property, and that she is, like the London married woman subject to her own custom or law, and liable to be sued on her contracts. The incapacity to contract which affects a married woman at common law is founded on the fiction that she and her husband are one person; but I think that fiction may well be confined to that kind of marriage for which it was intended, the Christian and indissoluble marriage. To extend it to the Mahometan marriage would be to apply it to something different, and to establish but a weak foundation for a law absurdly unjust and intolerably oppressive.

I am therefore of opinion that this plea is no answer to the action.

This decision is not inconsistent with holding, as I have held, that for the purpose of conveyance of land, the deed of a Mahometan as well as of a Christian woman is not operative unless acknowledged as required by the Indian Act of 1855, corresponding to the fines and recoveries abolition Act; for it is a fundamental principle of the common law that for all that relates to the forms and solemnities of conveyances, and even of executory contracts relating to land, the lex loci regit actum; Story Conf. L. ss. 363, 435.* Nor, for similar reasons, is it inconsistent with the decision by which it was established that the English Statute of Distributions applies to all persons of whatever religion or race. Nor does it seem inconsistent with the application of our own rules in questions of guardianship. But even if it were otherwise, it must be borne in mind that in applying foreign law to particular cases, Courts must be governed more by considerations of public policy and convenience than of strict logical consistency, and it is not therefore necessary to pursue this part of the subject further. For the reasons stated I am of opinion that the plea of coverture in this action is no answer to it, and that there must be judgment for the plaintiff.

* And See Cader Meydin v. Shatomah, post.

COURT OF JUDICATURE.

SINGAPORE.

In the Goods of Lao Leong An.

Administration granted to the first wife of a Chinese. The second wife entitled to an equal share of the Intestate's property. The law of China considered.

Singapore Daily Times,—1867.

Judgment of the Hon'ble. Sir P. B. Maxwell, Knt. Recorder.

In this matter, two petitions were filed praying

for letters of administration: one by the first, and the other by the second wife of the intestate, a Chinese inhabitant of this Settlement. I see no sufficient reason for refusing the application of the first wife, and letters of administration will therefore be granted to her. But as it was much urged, in resisting the claim of the second wife, that the condition of the latter was not that of a wife but merely of a concubine, I think it right, with the view of saving the parties the expense and suffering of a litigation, to say that I had to consider this question some years ago in Pinang, and that I was of opinion that a second or inferior Chinese wife was to all intents and purposes a lawful spouse and was entitled to share with the first or superior wife in the property of her deceased husband; and it may be as well if I state now the grounds of my opinion. It may seem difficult to apply the English statute of distributions where poligamy is a recognised institution; but this difficulty was long ago solved in this Settlement* by holding that where a Mahometan died intestate leaving two or more wives, they were entitled to share equally among themselves the share which the statute of distributions allots to the widow of a deceased person. In the case of Mahometans, however, all the wives are equal. Chinese polygamy differs in this respect, and the first question for determination is whether the second wife can be regarded as a lawful spouse at all. The first wife unquestionably holds higher rank in the household; she addresses her husband in terms of equality, while the inferior wives address both him and her as their superiors. The first wife if usually chosen by the husband's parents of a family of equal station, and is espoused with as much ceremony and splendour as the parties can afford; while the inferior wives are generally of his own choice made without regard to family connection. But that they are wives not concubines seems

* Vide ante pages 13 and 35.

to me clear from the fact that certain forms of espousal are always performed, and that, besides, their children inherit in default of issue of the principal wife, and that throughout the Penal Code of China they are treated as wives to all intents and purposes as well at the first. Thus, to make a first-wife marriage during the period of mourning for parents, is punishable with 100 blows ; to make a second-wife marriage in the same period is punishable with 80 blows. So, to marry while parents are in prison for a capital offence is punishable whether it be a first-wife or a second-wife marriage, but in the latter case by 20 blows less than in the former. Incest is punishable in both cases, but with 20 blows less in the case of the inferior marriage, Sects. 106—109. The law of divorce applies equally to inferior wives. They may be divorced for the same causes as the first wife and for none other ; and all infringements of this branch of the law are punished with a similar reduction of two degrees, or twenty blows, in the case of the inferior marriage. A man who sells his first or superior wife is liable to 100 blows and perpetual banishment ; he who sells his inferior wife is liable to 80 blows and two years banishment, Sect. 275. He who connives at, or compels his wife's adultery, is punishable but with one degree of greater severity when she is the first, than when she is an inferior wife. If the first wife strikes her husband, she is punished with 100 blows. If the inferior wife strikes him or his first wife, she is liable to a punishment one degree more severe, viz : 110 blows. If the husband wounds either, he is punishable, but with one degree of less severity when she is an inferior, than when she is a first wife.

It may be true as was contended, that in China the inferior wives have no share in the estate and effects of their deceased husband. But this is immaterial for the purpose of the present question. If it were otherwise, the first wife would not find it

easy, any more than the second, to establish her right to letters of administration. The intestate was domiciled in this Settlement, and his personal estate must therefore be distributed according to the law of the Settlement. He had, besides, real estate here, and this, independently of his domicil, must devolve according to the lex loci, that is, in the same way as chattel property, according to the construction, long established, of the Act of 1837. The rights of his wives therefore must be determined by our law, and not by that of China.

And here comes the second question for determination, viz: as to the relative rights of the first and inferior wives, inter se, in dividing the share which our law allots to the widow. They are not on a footing of equality like Mahometan wives; but our law, to which polygamy is not only foreign but repugnant, furnishes no rule for determining in what proportion wives of higher and lower rank shall share the widow's share, and I am unable to see any adequate grounds for any other division than an equal one.

COURT OF JUDICATURE.

SINGAPORE.

BEFORE THE HON'BLE SIR W. HACKETT, KNT.,

Acting Chief Justice.

Veeramah v. Sawmy.

The Court has no jurisdiction on its Ecclesiastical side to entertain suits for the restitution of conjugal rights of Hindoos. (August, 1867)

This was a libel instituted by a Hindoo wife against her Hindoo husband on the Ecclesiastical side of the Court, for restitution of conjugal rights. The Defendant protested against the supposed jurisdiction to the effect that "this Court ought not to "have or take further cognizance of this suit be-

"cause he saith that this Court is incompetent to "take cognizance of or proceed in the suit or to ad- "minister towards and upon the plaintiff the Eccle- "siastical Law as the same at the date of the Let- "ters Patent establishing this Court may be used "and exercised in the Diocese of London, in Great "Britain."

Protest allowed.*

*Et Vide Perozeboye v. Aderser Cursetjee, 10 Moore P. C. C. 374.—Ed.

COURT OF JUDICATURE.

PINANG.

BEFORE Sir P. B. MAXWELL, KNT. RECORDER.

Reg. v. Loon: in the Matter of Khu Lak Neoh.

The Court has jurisdiction on its civil † side to entertain suits for the restitution of conjugal rights amongst non-Christians, even on Habeas Corpus.

Pinang Gazette, 25th June, 1864.

In this case a woman was brought up by habeas corpus, on the application of her husband, who claimed that she should be ordered to return to him.

The woman resisted the application, alleging that she had not been married to him. Mr. Aitken appeared for her. Her mother denied the marriage, but said that she had received 30 dollars from the man as a consideration for cohabitation with her daughter; and that he had lived with her about six weeks.

After hearing evidence on both sides, in addition to the affidavits filed,

The Recorder held that the marriage had been proved, and ordered that the wife should return to her husband. In delivering judgment, he said that he should take that opportunity, as it was the first

† But see Vadamalia Pillay v. Shetthay Awah, post; also ex parte Sandilands and Reg. v. Leggatt, (cited in next page) as to Habeas Corpus.—Ed.

case of the kind in which any real contest had occurred, to explain upon what grounds the Court acted in cases like the present, in order that there might be no misapprehension on the subject. Where the parties concerned in a question of restitution of conjugal rights were Christians, the Court exercised the Ecclesiastical jurisdiction with which it was invested by the Charter; and it was incumbent on the parties to proceed on what was called the Ecclesiastical side of the Court. The Civil Court at home refused to interfere in such cases, because whether the husband had a right to compel his wife to return to him, was a question belonging solely to the Ecclesiastical Court, and one on which a Civil Court was not competent to decide. Reg. v. Leggett, 18 Q. B. 781. S. C. Nom. Exp. Sandilands, 21 L. J. Q. B. 342; and this Court would of course be bound by that authority in similar cases. But the Ecclesiastical jurisdiction of this Court in causes matrimonial was confined to Christians, and was not applicable to persons of other religions. This had been established a few years ago by the Privy Council in Cursetjee v. Perozeboye, (10 Moo. P.C. 375.) reversing the decision of the Supreme Court of Bombay. In coming to this conclusion, however, the Privy Council said that they "would much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life" among non-Christians; and they added "such remedies, we conceive, the Supreme Court on the civil side might administer, or at least remedies as nearly approaching to them as circumstances would allow. Proceedings might be conducted on the civil side with such adaptation to the circumstances of the case as justice might require." It was obvious therefore that it was the duty of the Court, in its civil side, to act upon this suggestion,*

* But see the more recent case of Hyde v. Hyde and Woodmansee, 35 L. J. P. & D. (1866).—Ed.

and that the decision in Exp. Sandilands was no authority where the parties were excluded from the Ecclesiastical Court. The only question, then, was, in what form these applications for the restitution of conjugal rights among non-Christians, should be brought before the Court. The present course had been usually adopted here in conformity with the practice which, he believed, prevailed at Madras, and although he was not insensible to the defectiveness of that course, he thought that a proceeding by petition against the wife directly would be preferable, and he did not think that any inconvenience or injustice would be done in the present case by following the usual practice.*

*See Sir P. B. Maxwell's Straits Magistrates, 144.—Ed.

SUPREME COURT.

PINANG.

BEFORE THE HONORABLE Sir Wm. HACKETT, KNT. JUDGE.

Vadamalia Pillay v. Shetthay Amah.

This Court has no Jurisdiction on its civil side to entertain suits for restitution of conjugal rights amongst Hindoos.

February, 1869.

This was a suit instituted on the civil side of the Court by a Hindoo husband against his Hindoo wife for restitution of conjugal rights. The woman pleaded cruelty and violent assault. There was no evidence as to the duties of husband and wife according to Hindoo law.†

His Honour the Judge held that the Court had no Jurisdiction in such cases, and referred to Hyde v. Hyde and Woodmansee, 35 L. J. P. & M. 57.

† And see 1 and 2 Strange's Hindu law, as to its being a criminal offence by that law.—Ed.

COURT OF JUDICATURE.

PINANG.

SIR WM. HACKETT, KNT., JUDGE.

Cader Mydin, Administrator of Hossansah.

v.

Shatomah.

A Mahomedan Married Woman must acknowledge by Deed assignments of her realty situate in the Colony in conformity with Indian Act XXXI of 1854. Husband must join in transfer or his absence be accounted for. 13th July, 1868.

This was an action of Ejectment in which Judgment had been given for the Plaintiff. The matter was re-argued last year and the original Judgment affirmed. The question was whether an assignment by a Mahomedan married woman of her realty in Pinang unacknowledged by Deed in conformity with Act No. 31 of 1854, and without the concurrence of her husband, was a valid conveyance.

D. Logan, Solicitor General, for the Plaintiff.

B. Rodyk for the Defendant.

Rodyk contended that as the Court had decided in Hawah v. Daud* that Mahomedan married women were entitled to their own property to their sole and separate use, it necessarily followed that the incidents appertaining thereto must also be granted to them. He cited

Taylor v. Meads, 34 L. J. Ch. 203.

Adams v. Gamble, 11 Irish Ch. Rep. 269.

Lechmere v. Brotheridge, 32 L. J. Ch. 577.

Haynes' Outlines of Equity. 2 Ed. 228.

Logan contended that the lex situs,-the law of the land,-must govern all such questions as to realty, and cited Story's Conflict of Laws.

His Honor the Judge held that every married woman, whatever her creed or race, must conform to the Act, and in conveying lands situate in this Colony they must obey the law of the land: that the natives wives are bound by the same law in such

* Vide ante page 26.

matters as other married women and that it would be contrary to public policy to allow of any such departure from the rule as had been contended for.* If the husband were absent the wife should apply to the Court, who would see that justice was done.

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* See Story's Confl. Laws, § 431,463.

APPENDIX.

SUPREME COURT.

SINGAPORE.

Choa Cheow Neo v. Spottiswoode.

Will by a Chinese directing rents and profits of land to be expended in "Sinchew" ceremonies, held void as being contrary to the law against perpetuities, and not a Charity.* Superstitious uses considered. Straits Observer, 19 Feb. 1869.

JUDGMENT OF SIR P. B. MAXWELL, KNT., CHIEF JUSTICE.

In this case the testator, Choa Chong Long, a person born and domiciled in Singapore, but of Chinese descent, by his Will, in the English language, after bequeathing legacies of 500 dollars apiece to each of two sons and four daughters, and making provision for another son, and after reciting that he was erecting a building for charitable purposes, and for the performance of religious ceremonies, according to the custom of his ancestors, called Sin Chew, to perpetuate the memories of his deputed (departed?) wives, as also of himself, after his decease, devised certain houses and land in Singapore and Malacca, and also his residuary estate, to trustees, upon trust to apply the rents and profits, after providing for repairs and insurance, "in the performance of such Sin Chew or Charity, in and to the names (manes?) of myself and my said wives hereinbefore named and mentioned, to be performed four times in each and every year at the least, and as much oftener as the funds applicable thereto will admit." The will contains also a direction to the trustees to see that the "Charity" is faithfully carried into effect according to the mode practised in cases of Charities in the Indian Presidency towns; it requires that the lands devised shall be held and continued in the testator's own name for ever, according to the term of the original grants; and it declares that the testator's wish is to preserve the funds so intended to be applied to such religions and charitable purposes as aforesaid, from being

* This case overrules in re Chong Long's Estate, ante page 13.—Ed.

embezzled or made away or interfered with by his sons, daughters or relations, or otherwise diverted from the purposes contemplated, not doubting that the East India Company and those in authority under them, would by due enforcement of its provisions, encourage wealthy, industrious and honest Chinese and other settlers in the Company's territories, to follow his example and thereby ultimately advance the wealth, prosperity, and permanency of its possessions in these parts.

The testator died about thirty years ago, leaving the two sons and four daughters to whom he had given the pecuniary legacies mentioned, and who, or whose representatives, are the plaintiffs in this suit, and leaving the other son already referred to, whom he describes as an object of his especial affection, but who is said by the plaintiffs to be illegitimate. The personal representative of this son is a defendant in this suit, but is out of the jurisdiction, and has not appeared or pleaded. The other defendant is the representative of the testator.

After the death of the testator, several applications were made to this Court, on its Equity and Ecclesiastical sides of the Court, by some of the plaintiffs or next of kin under whom some of them claim, the general result of which seems to be that a receiver was appointed, that it was ordered that the sum of drs. 280 a year should be set apart out of the rents for the performance of the ceremony mentioned, and that the residue of the rents and profits should be paid into the Treasury to the credit of the Sin Chew fund. The fund thus accumulated amounts now to upwards of drs. 33,500. These various proceedings were set up by the answer as a bar to this suit, but I held at the hearing that they had not that operation, whether regard were had to their ex parte character, or to the side of the Court in which some of them had been taken. It is therefore incumbent on me to determine the question raised by the suit.

The petition prays that it may be declared that the devise for the Sin Chew is void, and that the testator died intestate as to the property devised for that purpose, and consequently that it goes to the next of kin.

Several Chinese men of learning have been examined for the purpose of ascertaining what are the nature and object of this devise, and the substance of their evidence is as follows :—The word Sin Chew is composed of Sin, which means a spirit, soul or ghost, and Chew, which means ruler ; and the composite word means the spirit ruler, or spiritual head of the house. When a man dies, his name, with the dates of his birth and death, is engraved on a tablet ; this is enclosed in an outer casing, on which a new name, which is now for the first time given to him, and the names of his children, are engraved. This tablet is kept either in the house of the worshipper, or in that which has been set apart for the Sin Chew. It is sacred, and can be touched only by the male descendants or nearest male relatives of the deceased, who alone may look upon the name on the enclosed tablet. It is the representation of the deceased. At certain periods, viz., on the anniversary of his death, and once in each of the four seasons, his son or sons, or if he has none, his nearest male relative, but never his daughters or other females, go to the place where the tablet is, and lay on a table in front of it a quantity of food, such as pigs, goats, ducks, fowl, fish, sweetmeats, fruit, tea and arrack. They light joss-sticks, fire crackers, burn small squares of thin brown paper in the centre of each of which is about a square inch of gold or silver tinsel, they bow their hands three times, kneel, touch the ground with their foreheads, and call on the Sin Chew by his new name to appear and partake of the food provided for him. The food remains on the table for one or two or even three hours, during which time the spirit feeds on its ethereal

savour ; and to ascertain whether it is satiated or satisfied, two pitis (Chinese coins) or two pieces of bamboo are thrown on the table or on the ground in front of it, and if they both turn up with the same face, the offering is considered insufficient, and more food is laid on the table. After the lapse of a sufficient time to allow the spirit to partake of it, the same test is again resorted to, and so, until the coins or bamboos, by turning up different faces, shew that the spirit has had enough. The food is then removed, and eaten or otherwise disposed of by the relatives, but there is no distribution of it in charity or among the poor. Indeed the Chinese have a repugnance to food which has been offered in this way, except when they are members of the family. The papers which are burnt supply the spirit with money and clothing, the gold and silver tinsel turning into precious metal. No prayers are offered to the spirit ; the persons who makes the offering of food asks for nothing whatever. The primary object of the ceremony is to show respect and reverence to the deceased, to preserve his memory in this world, and to supply his wants in the other. Its performance is agreeable to God, the supreme all-seeing, all-knowing, and invisible being, who assists and prospers those who are regular in this duty ; and its neglect entails disgrace on him whose duty it is to perform it, and poverty and starvation on the neglected spirit, which then leaves its abode (either the grave or the house where the tablet rests) and wanders about, an outcast, begging of the more fortunate spirits and haunting and tormenting his negligent descendant, and mankind generally. To avert the latter evil, the wealthier Chinese make, in the seventh month, every year, a general public offering, or sacrifice, called Kee-too or Poh-toh for the benefit of all poor spirits.

The question is whether this devise or bequest is valid.

No difficulty arises in respect of the 9 Geo. 2 c. 36, commonly called the Mortmain Act; for that act is not law here, Attorney General v. Stewart, 2 Mer. 163, and consequently lands may be devised for any uses which are recognized by our law as charitable. It was admitted, however, by Mr. Woods, who contended for the validity of the devise, that it did not fall under the legal destination of charitable; and it seems to me that it would have been difficult to establish that it did. The term charity receives, in questions of this kind, a peculiar but wide meaning; and although the Statute of Charitable Uses may not be law here, I think that it may be laid down that not only the various objects mentioned in its preamble—such as gifts and devises for poor people, for sick and maimed soldiers and sailors, for schools, education and learning, for the repair of churches, bridges, and other public works, and for other purposes which it is unnecessary to enumerate—but also, as in England, all objects having any analogy to such uses, would be regarded as charitable. Lord Cranworth said in the case of the University of London v. Yarrow, 26 L. J. Ch. 430, that every object beneficial to the community is a charity in the legal sense of the term; it is wide enough, at all events, to comprise gifts for the support and diffusion among men of every kind of religion, provided it be not immoral or cruel, or otherwise against public policy. It was held, for instance, by Lord Romilly, that a legacy to print and propagate the writings of Johanna Southcote was a good charity, as, however foolish they might be deemed by most persons, they were neither immoral nor irreligious, and were designed by the testator to confer a benefit on the community, Thornton v. Howe, 31. L. J. Ch. 767; and I do not doubt that the validity of a bequest for the maintenance or propagation of any Oriental creed, or for building a temple or mosque, or for setting up or adorning an idol, as in an Indian case mentioned by

Mr. Woods, would be determined in this Court on the same principle, and with the widest regard to the religious opinions and feeling of the various Eastern races established here. I make these remarks, not because they are necessary to the decision of this case, but to guard against my present judgment being misunderstood as questioning the validity of any Eastern charity. In the case before me, however, the devise is plainly not charitable; it has not any charitable object whatever, whether general or special, in the sense of a benefit to any living being. Its object is solely the benefit of the testator himself; and although the descendants are supposed incidently to derive from the performance of the Sin Chew ceremony the advantage of pleasing God and escaping the danger of being haunted, those advantages are obviously not the object of the testator, nor if they were, would they be of such a character as to bring the devise within the designation of charitable, as used in our Courts in reference to such subjects.

But if the devise is not a charity, on what ground can it be supported? It is clear that in Englond it would be void. In West v. Shuttleworth, 2 M. and K. 684, Lord Cottenham held that bequests to Roman Catholic priests and chapels, in order that the testatrix and her deceased husband might have the benefit of their prayers and masses, were void, and the same question has been since decided in the same way in Heath v. Chapman, 23 L. J. Ch. 947, and Blundell's Trusts in 31 L. J. Ch. 52. As Lord Cottenham observed, there was nothing of charity in their object; they were not intended for the benefit of the priests personally, or for the support of the chapels for general purposes; and they could not, therefore, be supported as charitable bequests. It is true, the legacies are in all those cases spoken of as void because superstitious; but as Sir W. Grant observed in Cary v. Abbot, 7 Ves. 495, there is no statute making superstitious uses or bequests void

generally. The statute of 1 Ed. 6 c. 14 relates only to superstitious uses of a particular description then existing, and the 23 Hen. 8 c. 10, which was intended to guard against the loss suffered by feudal superiors through alienations in mortmain, rather than to check the spread of superstition, relates only to assurances of land to churches, chapels, and corporate or quasi corporate bodies, for longer terms than twenty years. Besides, when West v. Shuttleworth was decided, the dogmas and practices of the Roman Catholic religion had ceased to be superstitious in the eye of the law. The 2 & 3 W. 3 c. 115, had placed it on the same footing as other forms of Christianity dissenting from the established one, in respect of their schools, places of worship, and charities ; and a bequest for the repair of a Roman Catholic chapel, or the propogation of the Roman Catholic religion, was as valid as one for repairing a Protestant Parish Church, or spreading the Protestant faith, De Windt v. De Windt, 23 L. J. Ch. 776, Bradshaw v. Tasker, 2 M. & K. 221. Lord Cottenham, indeed, referring to some early authorities collected in Duke on Charitable Uses, observed that the Act of Ed. 6 had been considered as establishing that legacies to priests to pray for the soul of the donor were within the superstitious uses intended to be suppressed by that statute ; but the effect of his decision was that they did not fall within that Act ; for if they had, the illegal legacies would have been forfeited to the Crown, instead of being, as they were, held distributable among the next of kin. But, however, this may be, it seems to me that all such legacies, whether they be designated superstitious or otherwise are void upon another ground, viz., that not being for a public or quasi public benefit, they attempt to create a perpetuity. On this ground, a legacy to keep in repair the testator's tomb has been repeatedly held void, Rickards v. Robson, 31 L. J. Ch. 897, Lloyd v. Lloyd, 21 L. J. Ch. 598, Fowler v.

Fowler, 33 L. J. Ch. 674, Hoare v. Osborne, 35 L. J. Ch. 345. On the same ground, a devise of and to the trustees of a library established and kept up for purchasing and preserving books for the subscribers, was held void, Carne v. Long, 29 L. J. Ch. 503; and Lord Campbell intimated in the case of Thomson v. Shakespeare, Id. 278, that a bequest of money to erect and keep up a museum at or near Shakespeare's house, as a monument to the poet's memory would be void, "as a perpetuity, not being a charity." These words, indeed comprise the law on the subject. The law of England, as I understand it, does not allow the owner of property, whether real or personal, to dispose of it for all future ages as he desires, except in one case, and that is when his object is of some general benefit to man, or charitable, in the legal sense of the word. He may not settle either money or land on his children or descendants or other persons except for the limited period of lives in being and twenty one years beyond; still less may he devote his property in perpetuity of his own supposed private benefit, or for any other purpose not charitable. On this ground alone, and not because the law condemns as unsound the theological dogma which such a legacy implies, (for the acts of 23 Hen. 8 and 1. Ed. 6. are not in my opinion, law in these Settlements,) I should consider a bequest for masses for departed souls, void,—and the devise in this case void, unless the law of these Settlements differs in this respect from the law of England. It remains to consider this question.

In this Colony, so much of the law of England as was in existence when it was imported here, and as is of general (and not merely local) policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject, in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and

oppressively on them. Thus in questions of marriage and divorce, it would be impossible to apply our law to Mahometans, Hindoos, and Buddhists, without the most absurd and intolerable consequences, and it is therefore held inapplicable to them. Tested by these principles, is the rule of English law which prohibits perpetuities either of local policy, unsuited to an infant Settlement, or inapplicable by reasons of the harshness of its operation, to people of Oriental races and creeds ? The rule is not founded by any Statute, but is a rule of the common law, and it seems to me to be one of a general and fundamental character, of great economical importance, and as well fitted for a young and small community as a great State, for both are interested in keeping property, whether real or personal, as completely as possible an object of commerce, and a productive instrument of the community at large. I am, therefore, of opinion that in this Colony it is not lawful to tie up property and take it out of circulation for all ages, for any purpose not of any real or imaginary advantage to any portion of the community, and if the rule against perpetuities be law here, it might suffice to add that as the property in question in this present case is chiefly if not wholly real, the rule must apply to it invariably, whatever may be the creed, race, or nationality of its owner, on the ground mentioned in Story Conf. L. sect. 440, that it is out of the question to subject property of that nature to any but the local law, and thus introduce in our own jurisprudence the innumerable diversities of foreign laws. But waiving this point, if it be said that such a restriction on the power of impressing on property the will of its present owner in perpetuam, is unjust or oppressive to the natives of the East, I should desire some proof or illustration of such an effect. There is I believe, nothing in Chinese law, or customs—certainly, I have had no evidence of it—which requires the owner of property to

dispose of any part of it for the use of his own soul after death. It has not even been shewn that such a devise would be valid in China, or indeed that the power of testamentary disposition is known there at all. No similar devise appears to have been ever brought under the cognizance of the Court of these Settlements, though one of them, Pinang,† has been under British rule and inhabited by Chinese for upwards of eighty years; and surely if a devise in fee for the use of the testator's soul was dictated by some imperative religious obligation, the question now before me would have been raised and decided long ago. Certainly it would require very strong evidence to establish that it was regarded as a duty, in any religion, to disregard the claims of natural affection, and, as in this case, to dispose of the bulk of one's property in providing for the supposed benefit and comfort of his own soul, while he left his sons and daughters almost wholly unprovided for. As there is no such evidence, I am unable to see any reason for holding that the rule against perpetuities is less applicable to property in the hands of a Chinese and a Buddhist than to property in the hands of an Englishman and a Christian ‡ and I think that the former has no power to devise or bequeath property to be devoted in sæcula sæculorum to any purpose not charitable.

For these reasons, I think this devise void, and that the property is distributable among the testator's next of kin living at his death.

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† Sinchew is a custom well known in Pinang and practised there amongst the Chinese, but upon a very limited scale.—Ed.

‡ Sed qu., see Kistomchunder Seal v. Hooromooney Dassee, Bourke's Calcutta Cases, 290-91. (citing 1 Boulnois' Reports) which seems to decide that if the Hindoo Law contains no rule against perpetuities then the English rule does not apply to Hindoo devises. Refer as to the subject of endowment of idols to Goberdhum Bysack v. Shamchand Bysack, and Sibchunder Doss v. Sibkissen Bannerjee, cited in Bourke's Rep. 282.—Ed.

APPENDIX II.

COURT OF JUDICATURE.

JURISDICTION.

Notes of Cases.

I. Sultan of Johore.

1. Abdul Wahap bin Mahamat Alli v. Sultan Alli. Malacca, 4th May, 1843. Sir Wm. Norris, Knt. Recorder. Plea to the Jurisdiction overruled.

2. Veerapa Chitty v. Sultan Alli. Singapore, 22nd May, 1854. Sir Wm. Jeffcott, Knt. Recorder. Plea overruled.

3. Hadjee Hamid bin sembrum v. Tunku Alli. Singapore, 1st May, 1855. Sir Wm. Jeffcott, Knt. Recorder. Plea overruled.

II. Tumongong of Johore.

Koh Hong Lip v. Dyang Ibrahim Maharajah. Singapore, 20th Oct. 1858. Sir R. B. McCausland, Knt. Recorder. Action for assault, false imprisonment, pecuniary mulct, &c. Plea overruled.

III. Rajah of Quedah.

Lawrence Nairne v. Rajah of Quedah and Wan Ismail. Equity Suit. Pinang, 2nd March, 1861. Sir P. B. Maxwell, Knt. Recorder. Plea allowed.

APPENDIX III.

COURT OF JUDICATURE.

PINANG.

NOTES OF CASES, 1868.

1. Virapa Chitty v. J. J. Ventre.—Action on Surety Bond made at PINANG as to Marine Insurance on a French vessel, on a voyage from PINANG to SINGAPORE, &c. Loss of ship (Southward of the Carrimon Islands) through ignorance of (Certificated) Master and drifting by tide or current, Held no deviation. Phynn v. Royal Exch. Ass. Co. 7 T. R. 505, and Tait v. Levi, 14 East, 481 commented on. Semble, the Law of the Flag (French) should prevail. Judgment for Defendant.

2. Mootoo Curpen Chitty v. Lee Toh.—The ordinary printed "Chitty-Insurance" Bond (insurance on goods, but ship and goods must both be totally lost by foundering) held not void as a wager Policy. Judgment for Plaintiff.

3. Abdul Kader v. Shatomah.—Mahomedan married woman must acknowledge her assignments of her Realty in the Straits, by deed jointly with her husband, in accordance with Indian Act XXXI of 1854. Judgment for Plaintiff in Ejectment.

4. W. E. Maxwell, Administrator, v. Chittyappah Chitty.—Mortgage of Hackney carriage, but no agreement for sale. Sale by mortgagee upheld. Judgment for defendant.

5. Shedumbrum Chitty v. Jones.—Assignment of Salary by Deputy Sheriff held illegal.

6. Attorney General v. Kam Kong Gay, &c. (Opium Farmers of PINANG).—Local Excise Act XXIX of 1867 cancels, by implication, all Government Excise Contracts between the parties under Indian Act XXX of 1866. Judgment for the Crown.

7. Tan Kay v. Tan Lat. Action in Supreme Court. Writ of Ne exeat regno entitled by mistake as issuing out of the lately abolished Court of Judicature, held void, and Bail Bond, &c., ordered to be cancelled.

8. In the Goods of Meh Allang. Administration to adopted daughter refused and granted to the next of kin.

The End.